

BRIAN M. BOYNTON
Acting Assistant Attorney General

ERIC BECKENHAUER
Assistant Branch Director
Civil Division

STEVEN A. MYERS (NY Bar # 4823043)
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW
Washington, DC 20005
Tel: (202) 305-8648
Fax: (202) 616-8470
E-mail: steven.a.myers@usdoj.gov

Samara Spence* (DC Bar No. 1031191)
Jeffrey B. Dubner* (DC Bar No. 1013399)
Sean A. Lev* (DC Bar. No. 449936)
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043
sspence@democracyforward.org
jdubner@democracyforward.org
slev@democracyforward.org
(202) 701-1785
(202) 448-9090

Counsel for Plaintiffs

Additional counsel listed on signature block

** Admitted pro hac vice*

Attorneys for Defendants

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

COUNTY OF SANTA CLARA, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, *et al.*,

Defendants.

) Case No. 5:21-cv-01655-BLF

) **JOINT STATUS REPORT AND STIPULATED**
) **REQUEST FOR ORDER CONTINUING STAY**

Pursuant to the Court’s Order of July 30, 2021, *see* ECF No. 35, the parties respectfully submit the following joint status report addressing further proceedings, together with a stipulated request for an order continuing the stay of this action through February 1, 2022.

1. This is an Administrative Procedure Act (“APA”) case in which Plaintiffs challenge a final rule promulgated by the U.S. Department of Health and Human Services (“HHS”) entitled *Securing Updated and Necessary Statutory Evaluations Timely*, 86 Fed. Reg. 5694 (Jan. 19, 2021) (the “SUNSET

JOINT STATUS REPORT AND STIPULATED REQUEST FOR ORDER CONTINUING STAY
CASE NO. 5:21-CV-01655-BLF

1 Rule”). The SUNSET Rule provides, in essential part, that nearly all regulations issued by HHS in Titles
2 21, 42, and 45 of the Code of Federal Regulations shall expire at the end of (1) five calendar years after
3 the year that the SUNSET Rule first becomes effective, (2) ten calendar years after the year of the
4 regulation’s promulgation, or (3) ten calendar years after the last year in which HHS assessed and, if
5 required, reviewed the regulation, whichever is latest.

6 2. Plaintiffs filed their complaint challenging the SUNSET Rule on March 9, 2021. *See* ECF
7 No. 1. Plaintiffs alleged that the SUNSET Rule is *ultra vires*, *see id.* ¶¶ 123-30; arbitrary and capricious,
8 *see id.* ¶¶ 131-33; in violation of the APA’s notice-and-comment requirements, *see id.* ¶¶ 134-39; and in
9 violation of HHS’s Tribal Consultation Policy, *see id.* ¶¶ 140-44. Plaintiffs further alleged that the
10 SUNSET Rule threatens imminent and irreparable harm to them and the general public, including by
11 creating regulatory confusion and uncertainty that will impede their ongoing operations, budgeting, and
12 planning activities. *See, e.g., id.* ¶¶ 100-02; *see generally id.* ¶¶ 95-122.

13 3. As promulgated, the SUNSET Rule was scheduled to become effective on March 22, 2021.
14 *See* 86 Fed. Reg. at 5694. Shortly before the SUNSET Rule became effective, HHS postponed its effective
15 date for one year, to March 22, 2022, pursuant to 5 U.S.C. § 705. *See* 86 Fed. Reg. 15404 (2021). While
16 HHS did not concede liability, HHS stated that it “believes that the Court could find merit in some of
17 Plaintiffs’ claims.” *Id.* at 15,405. In particular, HHS stated that, in contrast to its prior findings, it “now
18 believes it is likely some regulations would expire without any additional process” and that this outcome
19 raises legal questions about whether “regulations promulgated through notice and comment rulemaking
20 can be terminated through an umbrella rule without individual consideration of the expiring regulations,
21 including any reliance interests.” *Id.* at 15,406. HHS further stated that it “may have significantly
22 underestimated the burden” of the rule and that the rule’s magnitude and timing “may have impeded the
23 full and deliberate consideration of all the potential issues related to the SUNSET rule.” *Id.*

24 4. On October 28, 2021, HHS issued a Notice of Proposed Rulemaking proposing to withdraw
25 or repeal the SUNSET Rule. *See* Dep’t of Health & Human Servs., Securing Updated and Necessary
26 Statutory Evaluations Timely; Proposal to Withdraw or Repeal, 86 Fed. Reg. 59,906 (Oct. 29, 2021).
27 HHS stated that it “reexamined the SUNSET final rule in light of the allegations in” this case, among other
28

things. *Id.* at 59,908. If the withdrawal rule were to issue as proposed, Plaintiffs' claims in this case may become moot. HHS is also reviewing the Rule in light of Plaintiffs' claims raised in this litigation, and seeks additional time to evaluate the claims and its position before taking further steps in this litigation.

5. The parties therefore jointly request that the Court continue the stay of this action through February 1, 2022, and direct the parties to file a joint status report proposing a schedule for further proceedings by that date.

Date: November 1, 2021

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

ERIC BECKENHAUER
Assistant Branch Director
Civil Division

/s/ Steven A. Myers
STEVEN A. MYERS (NY Bar # 4823043)
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW
Washington, DC 20005
Tel: (202) 305-8648
Fax: (202) 616-8470
E-mail: steven.a.myers@usdoj.gov

Attorneys for Defendants

/s/ Samara Spence
Samara Spence* (DC Bar No. 1031191)
Jeffrey B. Dubner* (DC Bar No. 1013399)
Sean A. Lev* (DC Bar. No. 449936)
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043
sspence@democracyforward.org
jdubner@democracyforward.org
slev@democracyforward.org
Telephone: (202) 448-9090

Counsel for All Plaintiffs

James R. Williams (CA Bar No. 271253)
County Counsel
Greta S. Hansen (CA Bar No. 251471)

Douglas M. Press (CA Bar No. 168740) Office of
the County Counsel
County of Santa Clara
70 West Hedding Street, East Wing, 9th Fl.
San José, CA 95110-1770
lorraine.van_kirk@cco.sccgov.org
Telephone: (408) 299-5900

Counsel for the County of Santa Clara

Lisa S. Mankofsky* (DC Bar No. 411931)
Matthew Simon* (DC Bar No. 144727)
Center for Science in the Public Interest
1220 L Street, NW, Ste. 300
Washington, DC 20005
lmankofsky@cspinet.org
msimon@cspinet.org
Telephone: (202) 777-8381

*Counsel for Center for Science in the Public
Interest*

Adeline S. Rolnick*
Natural Resources Defense Council
1152 15th Street NW, Ste. 300
Washington, DC 20005
arolnick@nrdc.org
Telephone: (202) 513-6240

Counsel for Natural Resources Defense Council

** Admitted pro hac vice*

LOCAL RULE 5-1(i) ATTESTATION

I attest that I have obtained Samara Spence's concurrence in the filing of this document.

/s/ Steven A. Myers
Steven A. Myers

~~PROPOSED~~ ORDER

PURSUANT TO STIPULATION, IT IS SO ORDERED. The case shall remain STAYED through February 1, 2022, by which date the parties shall submit a joint status report proposing a schedule for further proceedings.

Dated: November 1, 2021


HON. BETH LABSON FREEMAN
UNITED STATES DISTRICT JUDGE